

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM HUNT,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 1650632.03

A P P E A L

D E C I S I O N

Headnotes: 1402.40; 1803; 3202

Defendant Second Injury Fund of Iowa (the Fund) appeals from an arbitration decision filed on September 27, 2022. Claimant William Hunt cross-appeals. The case was heard on April 18, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 14, 2022.

Prior to the evidentiary hearing, the parties stipulated that claimant sustained a first qualifying injury to his right leg in 1995, and a second qualifying injury to his left leg on June 11, 2018. In the arbitration decision, the deputy commissioner found the combined effects of the two injuries resulted in 65 percent industrial disability, which entitles claimant to receive 325 weeks of permanent partial disability (PPD) benefits, less appropriate credits to the Fund. The deputy commissioner found the Fund is entitled to a credit of 22 weeks for the 1995 first qualifying injury to the right knee, a credit of 81.4 weeks for the June 11, 2018, second qualifying injury to the left leg, and a credit of 11 weeks for a 2014 injury to the left ankle, for a total credit of 114.4 weeks. The deputy commissioner found the Fund is not entitled to receive a credit of 81.4 weeks for a right total knee replacement.

On appeal, the Fund asserts the deputy commissioner erred in his assessment of industrial disability against the Fund. The Fund further asserts the deputy commissioner erred in calculating the credit due to the Fund for claimant's right knee injury.

Claimant asserts on cross-appeal that the deputy commissioner erred in finding claimant sustained 65 percent industrial disability as a result of the two injuries taken together. Claimant asserts the amount of industrial disability resulting from the two injuries taken together should be increased substantially. Claimant further asserts the deputy commissioner erred in finding the Fund is entitled to a credit of 11 weeks for the 2014 injury to claimant's left ankle.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, those portions of the proposed arbitration decision filed on September 27, 2022, relating to issues properly raised on intra-agency appeal are affirmed in part and are modified in part.

I affirm the deputy commissioner's finding that the combined effects of claimant's injuries result in 65 percent industrial disability. I affirm the deputy commissioner's finding that the Fund is entitled to a credit of 11 weeks for the 2014 injury to claimant's left ankle. With the additional analysis set forth below, I respectfully disagree with, and modify, the deputy commissioner's findings and conclusions regarding the extent of the Fund's credit.

On the hearing report, the parties stipulated that claimant sustained a qualifying first loss to his right leg in 1995 when he fell getting out of a skid loader. (See Hearing Report) As a result of the injury, claimant underwent an ACL reconstruction in February 1996. (See Joint Exhibit 6, p. 51) According to medical records in evidence, claimant had an uneventful postoperative recovery and was able to return to his work as a farmer and a plumber without any real difficulty. (See JE6, p. 51)

Years later, on or about July 2, 2001, claimant twisted his right knee while working on a 4-H project. He experienced a sharp pain and was unable to bear weight. (JE6, p. 51) After examining claimant's right knee, Scott Schemmel, M.D. recommended and performed a diagnostic arthroscopy. During the procedure, Dr. Schemmel found an articular surface defect of the medial femoral condyle, arthrosis of the under-surface of the patella, and a medial compartment loose body. (JE6, p. 54) Dr. Schemmel removed the loose body and performed an arthroscopic chondroplasty of the medial femoral condyle and the under-surface of the patella. (Id.)

In March of 2002, claimant was kicked twice by a steer on the lateral aspect of his right thigh. (See JE6, pp. 60, 62) Claimant presented to Dr. Schemmel and reported increased medial knee discomfort and the feeling that his knee was more unstable. (JE6, p. 60) When conservative treatment failed to alleviate claimant's complaints, Annunziato Amendola, M.D. recommended and performed a high tibial osteotomy. (JE6, pp. 71, 72-73) The procedure occurred on November 1, 2002. (JE6, p. 72)

On July 10, 2020, over a year and a half before the evidentiary hearing on April 18, 2022, claimant underwent a right total knee arthroplasty performed by Mark Gorsche, M.D. The parties submitted the operative report into evidence. (JE6, p. 101)

Five months after the right total knee arthroplasty, claimant presented to Robin Sassman, M.D. for an independent medical evaluation (IME). (Ex. 2)

In her report, Dr. Sassman opined that it would not be appropriate to assess impairment based on claimant's range of motion measurements on the date of the IME because claimant had recently undergone a right knee replacement on July 10, 2020.

(Ex. 2, p. 20) No further explanation was provided. Presumably, Dr. Sassman did not believe that claimant had reach MMI as of the date of the examination.

Instead, Dr. Sassman elected to assess claimant's permanent impairment based on range of motion measurements from a November 18, 2002, medical record. The report provides, "This documentation was from Dr. Schemmel's notes of 11/18/2002 that stated the range of motion of the right knee was from 0-90 degrees. Therefore, turning to Table 17-10 on page 537, he is assigned 10% lower extremity impairment for the right knee."

In the arbitration decision, the deputy commissioner found that at the time of hearing, the best evidence of claimant's functional disability in the right leg was the ten percent impairment rating assigned by Dr. Sassman. As such, the deputy commissioner limited the Fund's credit for the pre-existing right leg condition to 22 weeks. I respectfully disagree with the deputy commissioner's finding.

Dr. Sassman's impairment rating is based on range of motion measurements collected nearly 20 years prior to the date of the evidentiary hearing. More importantly, it does not appear as though range of motion measurements were actually collected at the November 18, 2002, appointment. As previously mentioned, claimant underwent a high tibial osteotomy on November 1, 2002. (JE6, p. 72) Due to his recent surgery, when claimant presented to his first follow-up appointment on November 18, 2002, he was, "toe touch weight bearing with crutches." (JE6, p. 77) The record provides, "He is doing home PT and is (sic) range of motion is from 0 to 90 degrees, he states." (*Id.*) As such, it appears Dr. Sassman relied on claimant's own understanding of his range of motion in calculating his permanent impairment.

Given these concerns, I do not find Dr. Sassman's impairment rating persuasive or reflective of claimant's right knee condition on the date of the evidentiary hearing.

Between the June 11, 2018, work injury, and the April 18, 2022, evidentiary hearing, claimant underwent two total knee arthroplasties. The first occurred to his left knee on May 17, 2019. (JE5, p. 33) Five months later, claimant's authorized treating surgeon placed him at maximum medical improvement, released him without any restrictions, and assigned 37 percent lower extremity impairment. (JE5, p. 46) The second total knee arthroplasty occurred on July 10, 2020. The evidentiary record does not provide when claimant reached maximum medical improvement following his second surgery; however, claimant testified that Dr. Gorsche had released him without restrictions. (Tr. p. 51) There is no indication that an impairment rating was requested from Dr. Gorsche between July 10, 2020, and April 18, 2022.

Relying on Harrell v. Denver Findley & Sons, Inc., File No. 5066742, the Fund asserts the best evidence of claimant's functional disability in the right leg at the time of hearing is the minimum impairment rating assigned for a total knee replacement by the AMA Guides. Consistent with the 37 percent rating for the left lower extremity, the Fund is requesting 81.4 weeks of credit for claimant's right lower extremity injury and resulting surgery.

In Harrell, the claimant asserted a workers' compensation claim against his former employer, its insurer, and the Fund. The claimant testified he underwent total knee replacement surgery for purposes of his claim against the Fund; however, the parties did not present any medical evidence of the knee replacement surgery or an impairment rating for it. The deputy commissioner found Harrell underwent a total knee replacement in 2006 or 2009; however, relying on Iowa Code section 85.34(2)(x), he declined to grant the Fund a credit. The deputy commissioner reasoned that adopting the minimum compulsory impairment rating allowed under the AMA Guides for a total knee arthroplasty, without an expert opinion supporting it, required the use of lay testimony or agency expertise and was forbidden under Iowa Code section 85.34(2)(x).

On appeal in Harrell, I disagreed, and found the Fund was entitled to a credit of 81.4 weeks for the 37 percent permanent partial disability attributable to the total knee replacement. In the context of determining whether the Fund is entitled to a credit, I held:

In this case, it is undisputed claimant underwent a left total knee replacement prior to his April 23, 2018, work injury. The AMA Guides, Fifth Edition provides a minimum, compulsory impairment rating of 37 percent for a total knee replacement. It is unnecessary for a deputy commissioner to utilize lay testimony or agency expertise in this scenario. The deputy commissioner is not acting as a medical professional and determining the appropriate impairment rating to assign based on any physical findings. Rather, the deputy commissioner is utilizing the AMA Guides, Fifth Edition to locate a minimum, compulsory rating for purposes of a credit. Such a finding does not require “physical evaluations, a medical history review, consideration of past and subsequent injuries, apportionment issues, etc.” as asserted by claimant. A deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairment ratings or locating a minimum, compulsory impairment rating as provided for in The Guides.

Harrell v. Denver Findley & Sons, Inc., File No. 5066742 (App. Oct. 6, 2020).

On judicial review, the district court affirmed the determination that the Fund was entitled to a credit for the total knee arthroscopy. However, the Court of Appeals reversed, finding the 37 percent impairment determination was inconsistent with section 85.34(2)(x)'s prohibition on the use of lay testimony to determine loss or percentage of permanent impairment. Harrell v. Denver Findley & Sons, Inc., File No. 21-0827, 2022 WL 2824746 (Iowa Ct. App. July 20, 2022) The court explained,

The commissioner's impairment determination was built on the assumption that Harrell had undergone a total knee replacement surgery. But no physician or other expert testified about a total knee replacement surgery. And no records from a total knee replacement surgery were entered as exhibits. The only evidence of a total knee replacement surgery is Harrell's own testimony—the very “lay testimony” forbidden by section

85.34(2)(x). So it appears the commissioner's determination violated the statute.

Id. at 2. The court did not address whether non-physicians may properly use the Guides to locate and apply the minimum impairment rating that can be assigned as the result of a surgical procedure for the purposes of a credit.

The instant case is distinguishable from Harrell in that the evidentiary record contains the operative report for the July 10, 2020, total knee arthroplasty. (JE6, p. 101)

Under the AMA Guides, Fifth Edition, Table 17-33, p. 547, a total knee replacement yields a minimum rating of 37 percent of the lower extremity. Therefore, the Fund asserts entitlement to 81.4 weeks of credit for the right lower extremity injury.

This Agency has previously held that a medical impairment rating is not an absolute legal requirement when establishing qualifying first injuries. See George v. Second Injury Fund of Iowa, File No. 5001966 (App. Nov. 30, 2004) In George, a former commissioner held, "So long as a prior loss of use is established and some measure of degree can be placed upon it, even if only by the judgment of the deputy, a qualifying first loss can be established." This Agency has also provided that it would create an unfair double standard to allow a claimant to establish a qualifying first injury without an impairment rating, while simultaneously not allowing the Fund to assert a credit for a qualifying injury without an impairment rating. Meador v. Second Injury Fund of Iowa, File No. 5057325 (App. Nov. 25, 2019)

Claimant concedes, "the total knee replacement was in fact the continuation, progression, and end result from the right knee dating back to 1995 through the early 2000's." (Appeal Brief, p. 25) However, claimant asserts there is no authority to support a finding that the Fund is entitled to credit for a surgical procedure that occurred after the second qualifying injury. In response, the Fund correctly points to Escher v. Mercy Hosp. Iowa City, Inc. and Second Injury Fund of Iowa, File No. 5051740 (App. Dec. January 11, 2018). In Escher, the claimant sustained a right knee injury in 2000, and a bilateral knee injury in 2004. Following the 2004 injury, claimant was assessed seven percent impairment to both knees. Then, on September 14, 2011, the claimant sustained a work-related slip and fall injury to her left knee. Several months later, the claimant underwent bilateral total knee replacements. No physician causally related claimant's need for the right total knee replacement to the September 14, 2011, injury. Following the bilateral total knee replacement, the claimant's expert physician assessed 50 percent impairment to the left knee and 50 percent impairment to the right knee. The claimant asserted that the Fund was only entitled to a credit for the impairment assigned to claimant's right knee prior to the September 14, 2011, work injury. The deputy commissioner rejected this argument and based the Fund's credit on the 50 percent impairment rating. The deputy commissioner's conclusion was affirmed on appeal.

Ultimately, the Fund is responsible for the industrial disability after the second injury that exceeds the disability attributable to the first and second injuries. In assessing claimant's industrial disability, the deputy commissioner considered the

"substantial functional disabilities in both knees and his left ankle." (Arbitration Decision, page 6) The deputy commissioner also considered the permanent restrictions assigned by Dr. Sassman, which include limitations assigned to the right knee. (Ex. 2, p. 21) It would be inequitable to assess industrial disability based, in part, on the condition of claimant's right knee as of the date of the evidentiary hearing, and simultaneously limit the Fund's credit to an impairment rating based on the condition of claimant's right knee twenty years prior.

The deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairment ratings. Similarly, the deputy commissioner does not act as a medical professional or utilize agency expertise when locating and applying a minimum impairment rating assigned as the result of a surgical procedure for the purpose of a credit under Iowa Code section 85.64.

I therefore modify the deputy commissioner's determination regarding the Fund's credit and I find the Fund is entitled to receive a credit of 81.4 weeks for the 1995 first qualifying injury to the right knee. I find the Fund is entitled to receive a credit of 81.4 weeks for the June 11, 2018, second qualifying work-related left knee injury. Lastly, I find the Fund is entitled to receive an additional credit of 11 weeks for the five percent permanent disability of claimant's left ankle which pre-existed the June 11, 2018, work injury, for a total credit to the Fund of 173.8 weeks.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 27, 2022, is affirmed in part, and is modified in part.

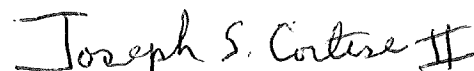
The Second Injury Fund of Iowa shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits commencing on May 3, 2021.

The Fund shall pay accrued weekly benefits in a lump sum.

The Fund shall receive credit for one hundred seventy-three point eight (173.8) weeks for claimant's functional losses from the first and second qualifying losses.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 1st day of March, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Zeke McCartney (via WCES)

Meredith Cooney (via WCES)